

KEY TO A GOOD LEASE IS NOT IN THE DEAL BUT IN THE DETAILS

By: Jack Garson, Esq.

True story: A tenant signed a lease for more than 100,000 square feet in a warehouse district, intending to use the space for offices. Zoning laws, however, prohibited office use in the warehouse district.

Unfortunately, the tenant was unaware of this restriction. To compound his problem, the tenant was responsible under the lease for complying with zoning requirements. As a consequence, the bargain space became expensive, unusable premises, and the tenant was faced with an enormous financial loss.

Whether you are a tenant or a landlord, creating a successful lease requires attention to detail, knowledge of the law and prevailing practices, and careful drafting of the document.

In today's soft real estate market, the first mistake a landlord often makes is choosing the wrong tenants.

Wrong tenants generally are those not financially able or willing to pay the rent. Other "wrong" tenants are those who interfere with other tenants' businesses. Or who damage the premises. Or who won't vacate the premises on time. Or who unleash any in a litany of other misdeeds on the landlord.

If you are a landlord, begin the tenant-selection process by requesting and reviewing background and resume information. Obtain prior landlord references. Be absolutely sure to analyze the financial statements of your prospective tenant.

Overlooking these critical steps can be frustrating and financially debilitating.

Likewise, the tenant should take appropriate and similar precautions.

While a landlord's background is important, lease provisions that protect the tenant are more important. Just as good

fences make good neighbors, precise lease provisions detailing the tenant's rights can help encourage better treatment by the landlord (or, at the very least, provide remedies if the landlord breaches its obligations).

Indeed, a review of typical commercial tenant grievances against landlords yields common complaints often founded on prevailing, but incorrect, assumptions:



- "I thought I was released from all obligations when I assigned my lease." Unless the lease provides otherwise, the tenant generally remains liable for all obligations after an assignment. When the new tenant (assignee) fails to pay the rent, the landlord could require the original tenant to pay.

- "When I didn't need the space anymore, I thought the landlord had

to try to find another tenant not just require me to pay the rent for the empty offices." Generally, that's not the case. The obligation to relet the premises or "mitigate damages" depends on the jurisdiction. However, the general rule in most states is that commercial landlords have no such obligation.

- "I thought the landlord was required to consent to my alterations. To fix the roof. Get the certificate of occupancy. Provide me with adequate parking." Depends, depends, depends mostly on the applicable lease provisions but occasionally on specific state or city statutes. Similarly, landlord expectations are often stymied by imprecise lease provisions or misunderstanding of applicable law.

- Giving a tenant the exclusive right to sell a particular product or service or conduct a particular type of business on the property, can cripple the landlord's ability to lease space to other tenants.

- Failure to obtain the tenant's waiver of the right to trial by jury can lead to lengthy delays in both the collection of rent and an otherwise lawful eviction.

- Granting a tenant an option to purchase the property or providing the tenant with a right of first refusal to lease adjacent premises can frustrate efforts to sell or lease the property. Without keen attention to detail, poorly prepared commercial leases can become Gordian knots that hamstring landlords and tenants:

- Tenants have been charged, as part of operating expenses, for their landlord's Christmas parties, political contributions and limousine rides.

- One tenant's unlimited right to parking prevented the landlord from leasing other vacant premises to new tenants. The lease allowed the tenant to use the available parking at the property without restriction. The tenant abused this right by parking its fleet of delivery trucks at the property, effectively prohibiting the landlord from leasing the remaining vacant space.

- Despite a tenant's full payment of rent, the landlord's failure to pay its own mortgage on the property resulted in the eviction of the tenant and the loss of hundreds of thousands of dollars of improvements made by the tenant to the premises.

Is there a perfect, safe solution?

Maybe not. But for tenants and landlords alike there are certain universal rules of the road: Know the law. Enlist the aid of experienced brokers, attorneys, and accountants. An architect, engineer and/or a project manager may be required to address construction issues.

Both parties should negotiate from a base of extensive experience yours or your advisers' and with an understanding of the marketplace and your bargaining power. Above all, demand that the lease reflects your expectations. And pay attention to details. After all, it's your lease. Protect yourself.

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Jack Garson's practice focuses on Real Estate, Construction and Business law. He serves as a legal advisor for numerous local, regional and national companies. In his role as legal counsel, Jack also serves as a strategic advisor and lead negotiator. Further, Jack provides guidance on the structure of complex transactions, the resolution of business disputes, the growth and sale of companies, and the management of issues such as liability and risk reduction, employment practices, and enhancing profitability.

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